ORIGINAL

No. 01-10940

In the Supreme Court of the United States

October Term, 2001

JAMES EDWARD PRICE, PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court, U.S.
FILED
JUN 18 2002
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PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit's ruling that the statutory maximum for Price's simple drug possession offense was the enhanced maximum, even in the absence of an enhancement information, conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997).

No. _____

In the Supreme Court of the United States

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JAMES EDWARD PRICE, PETITIONER

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner James Edward Price respectfully prays that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 18, 2001.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court.

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OPINION BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, styled *United States v. Price,* No. 00-51078 (5th Cir. Dec. 18, 2001) (unpublished), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2001. A petition for rehearing was timely filed, and it was denied on March 20, 2002.[1] This petition is filed within 90 days after the date rehearing was denied. See SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The texts of Title 21 U.S.C. §§ 844(a) and 851 are reproduced in Appendices C and D.

STATEMENT

Petitioner James Edward Price was convicted and sentenced in 1998 on charges that he possessed drugs and that he used or carried a firearm during that drug offense. After losing his direct appeal, Price sought collateral relief under 28 U.S.C. § 2255, and the district court exercised jurisdiction under that provision. The district court denied relief.

The Court of Appeals reversed. It ruled that Price's sentence for simple drug possession was unlawful. But it upheld his conviction for possession of a firearm during a drug felony, under 18 U.S.C. § 924(c)(1).

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1. The denial of the petition for rehearing is Appendix B.

It did so based on its finding that Price's simple drug possession offense qualified as a drug felony because it was potentially subject to recidivist enhancement even though no enhancement information under 21 U.S.C. § 851 had been filed. While the procedural background of Price's case is complex, it resolves to a single issue: whether the Fifth Circuit's ruling that the statutory maximum for Price's simple drug possession offense was the enhanced maximum, even in the absence of an enhancement information, conflicts with this Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1997).

A. Trial and Sentence in District Court.

In February 1998, Price, a 59-year-old Army veteran, was found in possession of cocaine base. The drugs, along with an unloaded handgun, were discovered after police arrested Price for a traffic violation. He went to trial before a jury on charges that he possessed the drugs with intent to distribute, and that he used or carried a firearm during that drug trafficking offense.

Price, who owned and operated Sonny's Barbecue, a small business in Hillsboro, Texas, testified at trial about how he innocently came to possess the drugs. He also testified that he did not intend to distribute or unlawfully possess them. As for the handgun, Price explained that he had lawfully purchased it for his wife, who was studying to become a police officer.

Prosecution witnesses disputed some of Price's explanations, and the Government argued that Price had knowingly possessed the cocaine base with intent to distribute it. The Government also contended that Price was

guilty of carrying a firearm during that offense because he had a handgun in his truck.

The jury acquitted Price of possession with intent to distribute, but convicted him of the lesser-included offense of simple drug possession, and of the firearm offense. He was sentenced to consecutive imprisonment terms totalling 123 months—63 months on the drug offense and 60 months on the firearm offense.

B. Price's Direct Appeal.

On appeal, Price's attorney argued that the evidence failed to prove a nexus between his firearm and drug offenses, that the jury instructions failed to adequately explain an element of the firearm offense, and that the trial court should have ordered further deliberations after the jury returned an altered verdict form. App. A at 2. The Fifth Circuit affirmed the convictions and sentences. *Id.*

C. Price's § 2255 Petition and the Fifth Circuit's Ruling.

Relying on Fifth Circuit precedent, Price filed a pro se motion under 28 U.S.C. § 2255, alleging that counsel's ineffective assistance resulted in a sentence that exceeded the statutory maximum for his simple drug possession offense. and in an improper conviction and sentence for use of a firearm during a drug trafficking offense. The Court of Appeals granted a certificate of appealability, appointed counsel, and considered Price's § 2255 appeal.

The Court ruled that trial and appellate counsel were ineffective for failing to challenge Price's 63-month sentence for simple possession of cocaine base. App. A. 2–4. Under Fifth Circuit precedent, Price's

conviction of the lesser offense was punishable under the first sentence of 21 U.S.C. § 844(a), which provided for maximum statutory terms of one to three years' imprisonment, depending on whether a defendant had prior drug convictions.[2] App. A at 3. Because Price's 63-month sentence exceeded these statutory maximums, it was an illegal sentence. *Id.* at 3–4.

The Court rejected Price's challenge to his firearm conviction and sentence, however. App. A at 4. Price had argued that, because his simple drug possession offense was punishable by no more than one year, and was therefore only a misdemeanor, it could not support a firearm conviction under 18 U.S.C. § 924(c), as that provision applied to firearms used or carried during a felony drug offense. App. A at 4. Relying on the presentence report's recitation that Price had two prior drug convictions,[3] the Fifth Circuit ruled that "[h]ad Price been correctly sentenced under § 844(a), the [district] court would have noted his two prior drug convictions, and Price would have faced a statutory maximum of either two or three years, rendering his drug possession a felony under § 924(c)(1)." App. A at 4.

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2. In pertinent part, § 844(a) provides: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction . . . for any drug . . . offense . . . he shall be sentenced to . . . no more than 2 years . . . except, further, that if he commits such offense after two or more prior convictions for any drug . . . offense . . . he shall be sentenced to . . . . not more than 3 years[.]" The complete text of 21 U.S.C. § 844(a) is reproduced as Appendix C.

3. Price disputed the accuracy of this recitation. *See* App. A at 4 n.7.

Price filed a petition for rehearing, arguing that his simple possession offense was not punishable by either two or three years because the Government had failed to file an enhancement notice as required by 21 U.S.C. § 851. Without a § 851 enhancement information, Price's § 844(a)'s offense of simple possession of a controlled substance was punishable by no more than one year's imprisonment. Therefore, it was not a felony and could not support his § 924(c) conviction for using or carrying a firearm during a drug felony. The petition for rehearing was denied. App. B.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S RULING THAT THE STATUTORY MAXIMUM FOR PRICE'S SIMPLE DRUG POSSESSION OFFENSE WAS THE ENHANCED MAXIMUM, EVEN IN THE ABSENCE OF AN ENHANCEMENT INFORMATION, CONFLICTS WITH THIS COURT'S DECISION IN *UNITED STATES V. LABONTE*, 520 U.S. 751 (1997).

The Fifth Circuit upheld Price's conviction for carrying a firearm during a drug felony[4] on the theory that the enhanced statutory maximum sentence for his simple drug possession offense was either two or three years, thus qualifying that offense as a felony. *See* App. A at 4. No enhancement notice had ever been filed in Price's case, however. In *United States v. LaBonte,* this Court found that, if no enhancement notice has been filed, the statutory maximum punishment is the unenhanced statutory maximum—not the enhanced maximum. 520 U.S. at 751, 759–60 (1997). Because the Fifth Circuit's ruling conflicts with *LaBonte,* this Court should grant certiorari and correct the court of appeals' error.

In *LaBonte,* this Court considered the validity of U.S. sentencing guidelines that calculated the statutory maximum sentence for certain "career offenders" without including their eligibility for recidivist enhancements under the drug laws. 520 U.S. 752–55. The Court concluded that the guidelines incorrectly determined the statutory maximum

4. Section 924(c) punishes a defendant who uses or carries a firearm during or in relation to "any drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). The Fifth Circuit, like other courts of appeals, has interpreted the term "drug trafficking offense" to include a simple drug possession offense, if it is a felony. *See United States v. Hinojosa-Lopez,* 130 F.3d 691, 694 (5th Cir. 1997); *see also, e.g., United States v. Restrepo-Aguilar,* 74 F.3d 361, 365 (1st Cir. 1996) (same); *United States v. Polanco,* 29 F.3d 35 (2d Cir. 1994) (same).

for these offenders because they overlooked that there are "two distinct categories of repeat offenders"—those "who have received notice [of enhancement] under § 851(a)(1) and those who have not." 520 U.S. at 759.

For "defendants who have received the notice under § 851(a)(1)," the statutory maximum, for purposes of 28 U.S.C. § 944(h), is the "enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." 520 U.S. at 759–60. Although the *LaBonte* Court was interpreting 28 U.S.C. § 944(h), its reasoning applies equally in Price's case, because the Court based its decision on Congress's statutory scheme for sentencing repeat offenders under Title 21, and Title 21's recidivist provisions apply to Price. *See* 520 U.S. at 758–59 (discussing repeat offender provisions of 21 U.S.C. § 841).

Under these provisions, Price did not qualify for recidivist enhancement because no § 851 notice had been filed in his case.[5] Indeed, the absence of such notice precluded any sentence greater than one year. *See LaBonte,* 520 U.S. at 754 n.1 (enhanced penalty may not be imposed unless Government files § 851 enhancement notice before trial or plea); *United States v. Steen,* 55 F.3d 1022, 1025 (5th Cir. 1995) (no enhancement permitted without § 851 enhancement notice); *Suveges v. United States,* 7 F.3d 6, 10 (1st Cir. 1993) (same). Apparently relying on the unrealized potential for § 844(a) enhancement, however, the Fifth Circuit ruled that

5. As the Fifth Circuit noted, there was a factual dispute about the existence of Price's alleged prior convictions. App. A at 4 n.7.

Price's simple drug possession offense was a felony because the maximum statutory term for that offense either two or three years under § 844(a)'s recidivist provisions. *See* App. A at 4.

The Fifth Circuit's ruling conflicts with *LaBonte*'s dictate that: "for defendants who have received the notice under § 851(a)(1) . . . the maximum term authorized is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." 520 U.S. at 759 (internal quotations omitted). For Price, who did not receive a § 851 notice, the unenhanced maximum of one year applies. The Fifth Circuit's contrary ruling must be reversed.

CONCLUSION

FOR THESE REASONS Price asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted.

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DATED: June 18, 2002.

APPENDIX A

United States v. Price,
No. 00-51078 (5th Cir. Dec. 18, 2001) (unpublished)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 18 2001
CHARLES R. FULBRUGE III
CLERK

Nº 00-51078
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES EDWARD PRICE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
Nº W-99-CV-287

Before JONES, SMITH, and
EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

James Price appeals the denial of his motion for collateral, post-conviction relief under 28 U.S.C. § 2255. We conclude that Price's trial and appellate counsel rendered constitutionally ineffective assistance by failing to raise dispositive circuit precedent holding that a sentence such as his exceeded the statutory maximum. Accordingly, we reverse and remand.

I.

In April 1998, Price was indicted on one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and one count of using and carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c). The district court instructed the jury that even if it did not find Price guilty beyond a reasonable doubt of possession with intent to distribute a controlled substance, it could find him guilty of the lesser included offense of simple possession.

The jury found Price not guilty on count one but guilty of the lesser included offense of possession of cocaine base and guilty on count two. The court sentenced him to sixty-three months' imprisonment for his drug possession under § 844(a) and sixty months' imprisonment for his firearm offense. On appeal, Price argued that (1) the evidence was insufficient to prove a nexus between his firearm and drug trafficking offense; (2) the jury instructions failed to explain the "in regard to" element of the firearm offense; and (3) the court should have required the jury to deliberate anew after it returned an altered verdict form. Price's lawyer did not argue that the sentence exceeded the statutory maximum under § 844(a), nor did he raise *United States v. Deisch*, 20 F.3d 139 (5th Cir. 1994), *overruled on other grounds*, *Apprendi v. N.J.*, 530 U.S. 466 (2000), in which we decided this very point. We affirmed the conviction.

Price filed a § 2255 motion, arguing that (1) his sentence exceeded the statutory one-year maximum under § 844(a); (2) he did not commit an underlying felony supporting conviction under § 924(c); (3) his trial and appellate counsel were ineffective for failing to challenge his sentences under § 844(a) and § 924(c); and (4) the government violated *Brady v. Md.*, 373 U.S. 83 (1963), by failing to point out that his sentence exceeded the statutory maximum. He amended his petition to include claims under *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi*. The district court denied Price's petition and, later, his request for a certificate of appealability ("COA"). We granted a COA on the ineffective assistance claims and appointed counsel on appeal.

II.

For denial of a § 2255 petition, we review factual findings for clear error and conclusions of law *de novo*. *United States v. Jones*, 172 F.3d 381, 383 (5th Cir. 1999). The guarantee of effective assistance of counsel extends to the first appeal of right. *Evitts v. Lucey*, 469 U.S. 387, 394 (1995); *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). We judge trial and appellate counsel's performance under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984): Price must show that his lawyers' performance was deficient and that the deficiency caused him prejudice. *Green v. Johnson*, 160 F.3d 1029, 1035, 1043 (5th Cir. 1998).

A.

Price argues that his sentence exceeds the statutory maximum for drug possession as a lesser included offense under § 844(a) and that his lawyers were deficient for not objecting. To prove deficient performance, Price must show his lawyer's "representation fell below an objective standard of reasonableness." *Washington*, 466 U.S. at 688. Although "[o]ur review is deferential," *Williamson*, 183 F.3d at 462, and we do not require counsel to "raise every nonfrivolous grounds of appeal available," *Green*, 160 F.3d at 1043, "[s]olid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention," *Williamson*, 183 F.3d at 463. Price's lawyers fell below this standard of reasonable assistance.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Section 844(a) provides a range of penalties for possession of a controlled substance.[2] The "first and second sentences" of that subsection prohibit possession of any quantity of "a controlled substance" and establish maximum penalties ranging from one to three years. *Deisch*, 20 F.3d at 143. The "third sentence" of § 844(a) prohibits possession of "a mixture or substance which contains cocaine base" if the amount exceeds a given quantity; the penalty is twenty years' imprisonment. *Id.* at 144.

The district court must have sentenced Price under the third sentence, the only part allowing a sixty-three-month sentence. This was error. In *Deisch*, 20 F.3d at 152, we held that "a violation of the third sentence of section 844(a) cannot be a lesser included offense under an indictment charging possession with intent to distribute in violation of section 841(a)(1)."

The facts in *Deisch* are nearly identical to those here,[3] so the holding is dispositive as to Price; Price's attorneys had an obligation to unearth it. *See Williamson*, 183 F.3d at 462 ("[A] reasonable attorney has an obligation to research relevant facts and law . . . ."). Further, at the time of Price's sentencing, *Deisch* had been on the books for over four years and had been invoked at least three times by this court;[4] counsel has no excuse for failing to discover it.[5] Price's lawyers failed to provide objectively reasonable assistance.

Price suffered prejudice if his lawyers' errors caused him to serve "any amount of actual jail time." *Glover v. United States*, 531 U.S. 198, 203 (2001). Under the first two provisions of § 844(a), Price could have been sentenced to a maximum of three years; instead, he was sentenced to more than five. *Deisch* is directly controlling precedent. It is certain that had Price's lawyer raised *Deisch* at sentencing or on appeal,[6] Price would have received a lighter sentence.

B.

Price challenges his sentence under § 924(c)(1) for using or carrying a firearm during and in relation to drug possession. He argues that his drug possession was a misdemeanor, and § 924(c)(1) applies only to felony offenses and that his lawyer rendered ineffective assistance by failing to object.

Because Price's claim is without merit, we conclude that his lawyers were neither deficient nor caused prejudice by failing to raise it. Under federal law, any offense for which a sentence of more than one year may be imposed is a felony. 18 U.S.C. § 3559(a); *United States v. Garrett*, 984 F.2d 1402, 1412 n.22 (5th Cir. 1993). Had Price been correctly sentenced under § 844(a), the court would have noted his two prior drug convictions,[7] and Price would have faced a statutory maximum of either two or three years,[8] rendering his drug possession a felony under § 924(c)(1).

The order denying relief under § 2255 is REVERSED, and this matter is REMANDED for further proceedings, as appropriate.

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[2] Section 844(a) states:

> [1] It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order . . . . [2] Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year . . . except that if he commits such offense after a prior conviction . . . for any drug or narcotic offense . . . he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years . . . except, further, that if he commits such offense after two or more prior convictions . . . for any drug or narcotic offense . . . he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years . . . . [3] Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 1 gram.
>
> 21 U.S.C. § 844(a).

[3] In *Deisch*, the indictment alleged possession of cocaine base; the defendant was acquitted under § 841(a)(1) but convicted for the lesser included offense of possession under § 844(a) and was sentenced to a sixty-month prison term under § 844(a).

[4] *See United States v. Hunt*, 129 F.3d 739, 745 (5th Cir. 1997); *United States v. Lucien*, 61 F.3d 366, 372 (5th Cir. 1995); *United States v. Steen*, 53 F.3d 1022, 1030 (5th Cir. 1995).

[5] *Cf. Williamson*, 183 F.3d at 462-63 (concluding counsel's failure to cite case decided after appeal was filed but before brief was submitted constituted deficient performance).

[6] Because Price's lawyer did not object at sentencing, his hypothetical appeal would have been reviewed for plain error. "A court plainly errs when it commits (1) an error (2) that is plain, *i.e.*, clear and obvious, (3) that affects the defendant's substantial rights," and affects the fairness, integrity, or public reputation of judicial proceedings. *Williamson*, 183 F.3d at 463 (citing *United States v. Olano*, 507 U.S. 725, 731-36 (1993); *United States v. Calverly*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc)). We still conclude that counsel's failure to raise *Deisch* prejudiced Price, so even under plain error review we would have been compelled to vacate and remand for resentencing.

[7] In 1976, Price pleaded guilty to possession of marihuana and served one day in jail. In 1988, he pleaded guilty to possession of a controlled substance and was sentenced to one day in jail and assessed $90.50 in court costs. Price claims this latter conviction has been vacated.

[8] *See* 21 U.S.C. § 844(a) (enhancing sentence for defendants with a final, "prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State").

APPENDIX B

Denial of Petition for Rehearing,
March 20, 2002

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 00-51078

U.S. COURT OF APPEALS
FILED
MAR 20 2002
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES EDWARD PRICE

Defendant - Appellant

Appeal from the United States District Court for the Western District of Texas, Waco

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ON PETITION FOR REHEARING

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

FEDERAL PUBLIC DEFENDER
RECEIVED
MAR 25 2002
WESTERN DIST. OF TEXAS
SAN ANTONIO, TEXAS

APPENDIX C

21 U.S.C. § 844(a)

(4) The court shall proceed as soon as practicable to the hearing and determination of such an action. An action under this subsection is governed by the Federal Rules of Civil Procedure except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

(Pub.L. 91–513, Title II, § 403, Oct. 27, 1970, 84 Stat. 1263; Pub.L. 95–633, Title II, § 202(b)(3), Nov. 10, 1978, 92 Stat. 3776; Pub.L. 98–473, Title II, § 516, Oct. 12, 1984, 98 Stat. 2074; Pub. L. 99–570, Title I, § 1866(a), Oct. 27, 1986, 100 Stat. 3207–54; Pub.L. 100–690, Title VI, § 6057, Nov. 18, 1988, 102 Stat. 4319; Pub.L. 103–200, § 3(g), Dec. 17, 1993, 107 Stat. 2337; Pub.L. 103–322, Title IX, § 90106, Sept. 13, 1994, 108 Stat. 1988; Pub.L. 104–237, Title II, §§ 203(a), 206(b), Oct. 3, 1996, 110 Stat. 3102, 3103.)

[1] So in original. Probably should be capitalized.

HISTORICAL AND STATUTORY NOTES

References in Text

Schedules I and II, referred to in subsec. (a)(1), are set out in § 812(c) of this title.

"This subchapter", referred to in subsecs. (a)(4)(A), (6), (7), (9), (b), and (c), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables.

"Subchapter II of this chapter", referred to in subsecs. (a)(4)(A), (6), (7), (9), (b), and (c), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see Tables volume.

The Federal Rules of Civil Procedure, referred to in subsec. (f)(4), are set out in Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Criminal Procedure, referred to in subsec. (f)(4), are set out in Title 18, Crimes and Criminal Procedure.

Effective and Applicability Provisions

1993 Acts. Amendment to this section by Pub.L. 103–200, to take effect on the date that is 120 days after the date of enactment of Pub.L. 103–200, which was approved Dec. 17, 1993, see section 11 of Pub.L. 103–200, set out as a note under section 802 of this title.

1988 Acts. Amendment by section 6057 of Pub.L. 100–690 effective 120 days after Nov. 18, 1988, see section 6061 of Pub.L. 100–690, set out as a note under section 802 of this title.

1978 Acts. Amendment by Pub.L. 95–633 effective Nov. 10, 1978, except as otherwise provided, see § 203(a) of Pub.L. 95–633, set out as a note under § 830 of this title.

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 91–513, set out as a note under § 801 of this title.

Effective Date of Repeal

Pub.L. 96–359, § 8(b), Sept. 26, 1980, 94 Stat. 1194, repealed § 203(d) of Pub.L. 95–633, formerly set out as a note under this section, which had provided for the repeal of subsec. (a)(4)(B) of this section effective Jan. 1, 1981.

§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical, offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the posses-

sion of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub.L. 98–473, Title II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

(Pub.L. 91–513, Title II, § 404, Oct. 27, 1970, 84 Stat. 1264; Pub.L. 98–473, Title II, § 219, Oct. 12, 1984, 98 Stat. 2027; Pub.L. 99–570, Title I, § 1052, Oct. 27, 1986, 100 Stat. 3207–8; Pub.L. 100–690, Title VI, §§ 6371, 6480, Nov. 18, 1988, 102 Stat. 4370, 4382; Pub.L. 101–647, Title XII, § 1201, Title XIX, § 1907, Nov. 29, 1990, 104 Stat. 4829, 4854; Pub.L. 104–237, Title II, § 201(a), Oct. 3, 1996, 110 Stat. 3101; Pub.L. 104–305, § 2(c), Oct. 13, 1996, 110 Stat. 3808.)

HISTORICAL AND STATUTORY NOTES

References in Text

"This subchapter", referred to in subsec. (a), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables.

"Subchapter II of this chapter", referred to in subsec. (a), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1106 of Title III, see Tables.

Effective and Applicability Provisions

1970 Acts. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see § 704(a) of Pub.L. 91–513, set out as a note under § 801 of this title.

§ 844a. Civil penalty for possession of small amounts of certain controlled substances

(a) In general

Any individual who knowingly possesses a controlled substance that is listed in section 841(b)(1)(A) of this title in violation of section 844 of this title in an amount that, as specified by regulation of the Attorney General, is a personal use amount shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

(b) Income and net assets

The income and net assets of an individual shall not be relevant to the determination whether to assess a civil penalty under this section or to prosecute the individual criminally. However, in determining the amount of a penalty under this section, the income and net assets of an individual shall be considered.

(c) Prior conviction

A civil penalty may not be assessed under this section if the individual previously was convicted of a Federal or State offense relating to a controlled substance.

(d) Limitation on number of assessments

A civil penalty may not be assessed on an individual under this section on more than two separate occasions.

(e) Assessment

A civil penalty under this section may be assessed by the Attorney General only by an order made on the record after opportunity for a hearing in accordance with section 554 of Title 5. The Attorney General shall provide written notice to the individual who is the subject of the proposed order informing the individual of the opportunity to receive such a hearing with respect to the proposed order. The hearing may be held only if the individual makes a request for the hearing before the expiration of the 30-day period beginning on the date such notice is issued.

(f) Compromise

The Attorney General may compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(g) Judicial review

If the Attorney General issues an order pursuant to subsection (e) of this section after a hearing described in such subsection, the individual who is the subject of the order may, before the expiration of the 30-day period beginning on the date the order is issued, bring a civil action in the appropriate district court of the United States. In such action, the law and the facts of the violation and the assessment of the civil penalty shall be determined de novo, and shall include the right of a trial by jury, the right to counsel, and the right to confront witnesses. The facts of the violation shall be proved beyond a reasonable doubt.

APPENDIX D

21 U.S.C. § 851

§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

(Pub.L. 91-513, Title II, § 411, Oct. 27, 1970, 84 Stat. 1269.)

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FILED
SEP 28 1999
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

JAMES EDWARD PRICE,	§	
Movant,	§	
	§	
v.	§	**CIVIL ACTION NO. W-99-CA-287**
	§	**CRIMINAL NO. W-98-CR-054**
	§	
UNITED STATES OF AMERICA,	§	
Respondent.	§	

ORDER

Before the Court is Movant's Motion to Set Aside or Correct Sentence made pursuant to 28 U.S.C.A. §2255. The Court, having considered same, finds that an answer would be appropriate in this case. Accordingly,

It is **ORDERED** that Respondent shall serve its answer within sixty (60) days after the service of the Movant's Motion to Vacate, Set Aside or Correct Sentence.

It is further **ORDERED** that Movant shall serve upon Respondent or, if appearance has been entered by counsel, upon its attorney, a copy of every further pleading or other document submitted for consideration by the Court. Movant shall include with the original papers to be filed with the Clerk of Court a certificate stating the date a true and correct copy of any document was mailed to Respondent or its counsel. Any paper received by a District Judge or Magistrate which has not been filed with the Clerk or which fails to include a Certificate of Service will be disregarded by the Court. It is further

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ORDERED that the Clerk of the Court forward a copy of Movant's Motion to the United States Attorney's Office.

SIGNED this 28 day of September, 1999.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FILED
OCT 04 2000
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

WESTERN DISTRICT OF TEXAS

JAMES EDWARD PRICE
Plaintiff

V.

UNITED STATES OF AMERICA
Defendant

JUDGMENT IN A CIVIL CASE

Case Number: W-98-CR-54
W-99-CA-287

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issued have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that Movant's Motion to Vacate, Set Aside, or Correct Sentence under the provisions of 28 U.S.C. § 2255 is **DENIED**. It is further

ORDERED that this case is **DISMISSED.**

October 4, 2000
Date

William G. Putnicki
Clerk

(By) Deputy Clerk